

BRB No. 11-0370

DANIEL BURGESS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SERVICE EMPLOYEES)	
INTERNATIONAL, INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	DATE ISSUED: 01/24/2012
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Rehabilitation Plan and Award of Charles D. Lee, District Director, United States Department of Labor.

Jerry R. McKenney and Wesley K. Young (Legge, Farrow, Kimmitt, McGrath & Brown), Houston, Texas, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Rehabilitation Plan and Award (Case No. 02-191275) of District Director Charles D. Lee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We review the district director's implementation of the vocational rehabilitation plan under the abuse of discretion standard. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

On August 29, 2009, claimant injured his left shoulder and back while working as a heavy truck driver for employer in Iraq. After initially receiving medical treatment in Iraq, claimant returned to the United States where he underwent joint reconstruction on his shoulder and physical therapy for his back.¹ On March 3, 2010, Dr. Tillett, who treated claimant for his left shoulder condition, opined that claimant reached maximum medical improvement and was capable of resuming full-duty work provided that he avoid activities where he could land on his left arm. A functional capacity evaluation performed on June 28, 2010, established that claimant was capable of performing light to medium work. On August 3, 2010, Dr. Shields, who treated claimant's back condition, opined that claimant reached maximum medical improvement and placed restrictions on claimant which included no repetitive jolting or twisting and no lifting over 30 pounds.

Claimant was evaluated by Ms. Eden, a certified vocational rehabilitation specialist, who opined that because claimant's prior employment included medium duty work as a truck driver and machine operator, claimant does not have transferable skills that fall within his current physical restrictions. On December 16, 2010, Ms. Eden, after finding that claimant was interested in working as a computer programmer/analyst, presented a "Plan Memo" recommending that claimant enroll in a two-year program at Elizabethtown Community College with the goal of obtaining an associate's degree in computer programming.²

On December 19, 2010, the Department of Labor provided employer with a Notice of Proposed Vocational Rehabilitation Plan. On January 6, 2011, the district director approved the proposed rehabilitation plan, and on January 11, 2011, claimant commenced classes at Elizabethtown Community College. On January 14, 2011, employer sought

¹The parties agree that employer has voluntarily paid claimant temporary total disability benefits since September 8, 2009.

²Claimant worked as a computer operator while in the United States military during the early 1990s.

reconsideration of the district director's approval of the proposed rehabilitation plan. On January 24, 2011, the district director issued a letter wherein he reviewed employer's specific objections to the proposed rehabilitation plan and found those objections to be without merit, stating that the rehabilitation plan was to be implemented as proposed since "it best represents the injured workers [sic] interests, aptitude, abilities and a reasonable expectation for success." District Director's January 24, 2011, letter at 1.

On appeal, employer contends that the district director erred in approving the rehabilitation plan since retraining was not necessary in this case because it established the existence of other employment that would have accommodated claimant's work restrictions. Employer also avers that the plan is not "short, realistic or attainable" and is therefore not in compliance with the regulations. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the district director's approval of the vocational rehabilitation plan as the district director did not abuse his discretion and the plan is supported by the underlying documentation. Claimant has not responded to this appeal.

Section 39(c)(2) of the Act gives the Secretary the discretionary authority to direct "the vocational rehabilitation of permanently disabled employees...." 33 U.S.C. §939(c)(2); *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT)(9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *see also Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). The regulations at 20 C.F.R. §§702.501-702.508 implement Section 39(c)(2), and Section 702.506 states in pertinent part,

Vocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially.

Reviewing the district director's implementation of claimant's vocational rehabilitation plan requires the Board to address whether the decision was based on a consideration of the relevant regulatory factors and whether there has been a clear error of judgment. *Meinert*, 37 BRBS at 166; *Cooper*, 22 BRBR at 40 (the Secretary of Labor's vocational rehabilitation determination may be challenged only on the basis that the Secretary has abused her discretion in making the decision). The regulatory factors relevant to a determination of the propriety of a vocational rehabilitation plan are few. The employee must be permanently disabled, 20 C.F.R. §702.501, the goal is to return the employee to remunerative employment within a "short" period of time, and it must restore or increase the employee's wage-earning capacity, 20 C.F.R. §702.506. Medical data and other pertinent information must accompany the OWCP's referral of the case to a rehabilitation

counselor. 20 C.F.R. §702.502. See *R.H. [Hopfner] v. Todd Pacific Shipyards, Inc.*, 43 BRBS 89 (2009).

Employer contends that vocational rehabilitation is unnecessary in this case because claimant retains a wage-earning capacity on the open market and that, moreover, upon the completion of the recommended plan, claimant would not experience a substantial increase in his wage-earning capacity if he commenced employment as a computer programmer/analyst. In this case, Ms. Eden reviewed claimant's medical and vocational history, and concluded that claimant's prior employment as a truck driver and machine operator did not result in transferable skills that fall within his present physical restrictions. After noting that claimant had been a computer operator while in the United States military and that claimant was interested in working as a computer programmer/analyst, Ms. Eden recommended that claimant attend Elizabethtown Community College for the purpose of obtaining a degree in computer programming.³ Citing data from the Bureau of Labor statistics and a web-site addressing employment positions in Kentucky, Ms. Eden stated that the projected growth in computer systems employment opportunities ranged from 19 to 29 percent, and she further set forth the wage rates anticipated by those positions.⁴

We hold that employer has not shown that the district director abused his discretion in implementing this rehabilitation plan, as employer has failed to demonstrate that he did not comply with the regulatory criteria. *Hopfner*, 43 BRBS at 91; *Meinert*, 37 BRBS at 166-167. Ms. Eden adequately documented the sources she relied upon in recommending that claimant commence college classes with the goal of obtaining a degree in computer programming, the potential growth in that area of employment, and the wages that claimant could anticipate receiving upon the completion of his program of instruction. Moreover, Ms. Eden noted claimant's interest in employment as a computer

³Ms. Eden noted that claimant had previously been successful in completing classes at Elizabethtown Community College.

⁴While employer argues that claimant's estimated post-plan weekly wages of between \$822.70 and \$1,272, are less than the weekly wages of the positions it identified as an AT&T or car salesman, employer's vocational specialist unequivocally declined to utilize the car salesman wages since they were based upon an individual being "very experienced" and the AT&T wages were placed in the range of \$354 to \$590 plus commissions.

programmer/analyst, and her recommended plan will return claimant to remunerative employment.⁵

We additionally reject employer's argument that its presentation of a labor market survey in which it identified alternate employment that claimant may be able to perform is sufficient to establish that the district director abused his discretion in approving claimant's rehabilitation plan. The objective of vocational rehabilitation is to "return permanently disabled persons to gainful employment...through a program of reevaluation or redirection of their abilities, *or* retraining in another occupation, *or* selective job placement assistance." 20 C.F.R. §702.501 (emphasis added). The identification of alternate jobs by employer does not preclude claimant from participating in a retraining program, make his retraining program unnecessary, or make him ineligible for such a program.⁶ *Hopfner*, 43 BRBS at 91; *Meinert*, 37 BRBS at 166. As employer has not established that the district director abused his discretion in approving the rehabilitation plan based on the regulatory criteria, we affirm the award. *Id.*

⁵The Board has previously stated that a claimant is more likely to succeed at a plan if, in addition to the plan's being suitable for him, it involves a vocation in which he is interested. *See Meinert*, 37 BRBS at 167 n.3.

⁶In this case, the district director stated that while the positions identified by employer either paid wages on a commission basis or represented entry-level wages with a limited opportunity for career advancement, the expectation of the proposed rehabilitation program is that the employee will enhance and advance his re-employment potential.

Accordingly, the district director's approval of the Rehabilitation Plan and Award for claimant is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge